In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 183

HENRY LEONARD, PETITIONER

v.

THE UNITED STATES

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 8) is reported in 64 C. Cls. 384.

JURISDICTION

The judgment of the Court of Claims was entered on January 9, 1928. (R. 11.) A motion for a new trial was seasonably made and overruled April 2, 1928. (R. 12.) The petition for certiorari was filed on June 8, 1928 (R. 12), and the writ was granted on October 8, 1928 (R. 13). Jurisdiction to issue the writ is found in Section 3(b) of the Act of February 13, 1925.

THE QUESTION

The question presented is whether the petitioner, a major in the Marine Corps, who was retired in 1911 because of wounds received in battle, should be permitted to count, for the purpose of determining the pay period applicable in the computation of his retired pay, the years spent by him on the retired list of the Marine Corps.

THE STATUTES

The pertinent provisions of the statutes are as follows:

Section 1261, Revised Statutes:

> The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * *
>
> Major: two thousand five hundred dollars a year. * * *

Section 1262, Revised Statutes:

> There shall be allowed and paid to each commissioned officer below the rank of brigadier general, * * * ten per centum of their current yearly pay for each term of five years of service.

Section 1263, Revised Statutes:

> The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

Section 1274, Revised Statutes (U. S. C., Title 10, Sec. 971):

> Officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired.

Section 1612 of the Revised Statutes (U. S. C., Title 34, Sec. 971):

> The officers of the Marine Corps shall be entitled to receive the same pay and allowances * * * as are or may be provided by or in pursuance of law for the officers * * * of like grades in the infantry of the Army.

Section 1622 of the Revised Statutes (U. S. C., Title 34, Sec. 681):

> The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section.

The Act of June 30, 1882, c. 254, 22 Stat. 117, 118:

> * * * That from and after the first day of July, eighteen hundred and eighty-two, the ten per centum increase for length of service allowed to certain officers by Section twelve hundred and sixty-two of the Revised Statutes shall be computed on the yearly pay of the grade fixed by Sections twelve hun-

dred and sixty-one and twelve hundred and seventy-four of the Revised Statutes * * *.

At the October Term, 1881, this Court, in the case of *United States* v. *Tyler*, 105 U. S. 244, held that for the purposes of computing the increased service pay an officer of the Army should be permitted to count the years during which he was on the retired list.

Act of March 2, 1903, c. 975, 32 Stat. 927, 932:

> * * * That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement.

Act of May 11, 1908, c. 163, 35 Stat. 106, 108:

> That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows: * * * major, three thousand dollars * * *. In no case shall * * * the pay of a major exceed four thousand dollars a year * * *.

The Act of June 10, 1922, c. 212, 42 Stat. 625 (U. S. C. Title 37, Secs. 1, 3, 4, 25, 26, 31):

> An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps,

Coast Guard, Coast and Geodetic Survey, and Public Health Service.

Be it enacted * * * That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general * * * pay periods are prescribed, and the base pay for each is fixed as follows:

The first period, $1,500; the second period, $2,000; the third period, $2,400; the fourth period, $3,000; the fifth period, $3,500; and the sixth period, $4,000.

* * * * *

The pay of the fifth period shall be paid to * * * majors of the Army * * * and officers of corresponding grade who have completed twenty-three years' service: * * *.

The pay of the fourth period shall be paid to * * * majors of the Army * * * and officers of corresponding grade who have completed fourteen years' service, or whose first appointment in the permanent service was in a grade above that corresponding to second lieutenant in the Army, or who were appointed to the Regular Army under the provisions of the first sentence of said section 24; * * *

* * * * *

Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each three years of service up to thirty years:

Provided, That the base pay plus pay for length of service of no officer below the grade of colonel of the Army, captain of the Navy, or corresponding grade, shall exceed $5,750. Nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay * * *.

* * * * *

SEC. 16. That nothing contained in this Act shall operate to reduce the pay of any officer on the active list below the pay to which he is entitled by reason of his grade and length of service on June 30, 1922 * * *.

* * * * *

SEC. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided*, That nothing contained in this Act shall operate to reduce the present pay of officers, warrant officers, and enlisted men now on the retired

list or officers or warrant officers in an equivalent status of any of the services mentioned in the title of this Act. Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion: * * * Retired officers of the Army, Navy, Marine Corps, * * * below the grade of brigadier general or commodore and retired warrant officers and enlisted men of those services, shall, when on active duty, receive full pay and allowances.

* * * * *

SEC. 22. That the provisions of this Act shall be effective beginning July 1, 1922, and all laws and parts of laws which are inconsistent herewith or in conflict with the provisions hereof are hereby repealed as of that date.

The Act of May 8, 1926, c. 274, 44 Stat. 417 (U. S. C. Supp., Title 14, Sec. 167a):

An Act to equalize the pay of retired officers of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

* * * That hereafter the retired pay of the officers and warrant officers of the Army, Navy, Marine Corps, * * * who were retired on or before June 30, 1922, shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date: *Provided*, That nothing in this Act shall operate to reduce the pay of any

officer or warrant officer now on the retired list.

SEC. 2. That all Acts or parts of Acts inconsistent with this Act are hereby repealed.

The Act of May 26, 1928, c. 787, 45 Stat. 774, amended Sec. 17 of the Act of June 10, 1922, *supra*, so as to provide:

> That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act, *which pay shall include increases for all active duty performed since retirement in the computation of their longevity pay and pay periods.* (Italics ours.)

STATEMENT

The petitioner was retired on September 30, 1911, because of wounds received in battle. At the time of retirement he was a major with 13 years, 1 month, and 26 days' service. (R. 6.) Since retirement he has had additional active service to the extent of 4 years, 9 months, and 29 days, or a total active service before and since retirement of 17 years, 11 months, and 25 days. His total service on the active and retired lists amounts to over 27 years. From April 8, 1926, he received the pay of a major of the Marine Corps, retired, at the rate of $250 per month, less 20 cents per month hospital fund, which rate represents the maximum pay of a retired major of the Marine Corps under the Act of May 11, 1908, under which Act the pay was greater than if he had

been paid the base pay of a major of less than 14 years' service in the third pay period prescribed by the Act of June 10, 1922, and is the same as the base pay prescribed by said Act for a major of the Marine Corps of more than 14 years' service in the fourth pay period. Petitioner also received longevity pay as a major of 27 years' service. If paid as a major entitled to base pay for 27 years' active service, he would receive the pay of the fifth period, or a difference for the time involved in this suit of the sum of $723.41. (R. 7.)

The Court of Claims held that for the purpose of computing his base pay as a retired officer petitioner was not entitled to count the years spent on the retired list. (R. 8 to 11.)

SUMMARY OF ARGUMENT

A careful examination of the many statutory provisions which must be taken into account leads to the conclusion that Congress intended to give to the petitioner, as the basis of his retired pay, the benefit of all active service which he has performed, and, in addition, such increase by way of longevity pay as accrued while he was on the retired list. That is what he has received. The statutory provisions do not warrant the inference that Congress intended to give him the same pay as that of an officer of equal rank and length of service, all of which had been on the active list.

ARGUMENT

At the time of retirement of petitioner the Act of May 11, 1908, fixing the base pay of a major at $3,000 per year, was in effect. Petitioner was therefore paid prior to the Act of June 10, 1922, a sum computed upon $3,000 as his base pay. This base pay provided by the Act of May 11, 1908, depended entirely upon rank and was in no manner affected by length of service. Petitioner has also received the longevity pay provided for by the appropriate statutes existing at the time of the various payments. There is no question here raised as to the correctness of the amount paid petitioner for longevity pay. The sole question is as to the proper base pay.

By the Act of June 10, 1922, the base pay of officers was made to depend upon both rank and length of service. A major of less than 14 years' service was to receive the base pay of the third period, which was $2,400 per year. A major of over 14 years' service was to receive the base pay of the fourth period, which was $3,000 per year, and a major of over 23 years' service was to receive the base pay of the fifth period, which was $3,500 per year.

At the time of retirement petitioner had active service of 13 years and 1 month. If this status controlled under the Act of June 10, 1922, he should have received the base pay of the third period of $2,400 per year. Since retirement petitioner has

had active duty to the extent of 4 years and 9 months, making a total active duty, both before and since retirement, of 17 years and 11 months. If this status is to control under the Act of June 10, 1922, he should have received the base pay of the fourth period, $3,000 per year. Petitioner, up to August 3, 1925, had a total service both active and retired of 27 years. If all of this time is to be counted under the Act of June 10, 1922, in determining the base pay, he should have received the base pay of the fifth period which is $3,500 per year.

There may be considerable question as to whether under the Act of June 10, 1922, active duty performed on detail since retirement may be counted in computing the base pay period, and, therefore, whether the proper period for petitioner is the third or fourth period but it is not necessary to decide this question. The base pay of the third period is $2,400 per year and that of the fourth period is $3,000 per year. If all of such active duty is counted, petitioner would be in the fourth period at $3,000 per year. At the time of the Act of June 10, 1922, he was receiving a base pay under the Act of May 11, 1908, of $3,000 per year.

The Act of June 10, 1922, provided that such act should not reduce the pay of any retired officer. Further than this, any doubt as to time on detail to active service since retirement is probably ended by the Act of May 26, 1928, which provided that after July 1, 1922, retired officers should have their

retired pay computed as authorized by law, which pay should include increases for all active duty performed since retirement in the computation of their longevity pay and pay periods, and the Government did not contest in the court below the legality of payment to petitioner calculated upon a base pay at the rate of $3,000 per year.

This leaves as the sole question in this case the determination as to whether petitioner should receive the base pay of the fourth or fifth period. Considering his total active and retired service, petitioner has had a service of over 27 years, and if he can count the same for the purposes of the determination of his pay period, he would receive the pay of the fifth period, being a major of over 23 years' service. If, however, he is to be permitted to count only the active service for the purpose of determining his pay period, then his base pay cannot exceed the sum of $3,000 per year, which is the base pay of the fourth period.

Section 1261 of the Revised Statutes provided a scale of pay for officers of the Army dependent upon rank regardless of the length of service. Section 1262 provided for a longevity pay based upon length of service, such pay being a 10 per cent addition to the yearly pay of the officer for each five years of service. Section 1274 of the Revised Statutes provided that retired officers should receive 75 per cent of the pay "of the rank upon which they are retired." Section 1254 of the

Revised Statutes (U. S. C. Title 10, Sec. 1025) provided that retired officers should be retired " upon the actual rank held by them at the date of retirement."

In 1881 this Court in the case of *United States* v. *Tyler*, 105 U. S. 244, determined that for the purposes of computing the longevity pay, provided for by Section 1262 of the Revised Statutes, retired officers should be permitted to count the service spent both on the active and retired lists.

The Act of March 2, 1903, changed the law so as to provide that only officers retired on account of wounds received in battle would be permitted to count both retired and active service in the computation of their longevity pay. By the Act of May 11, 1908, a new scale of base pay for officers was provided. This scale was also dependent upon rank regardless of any consideration for the length of service. Petitioner was retired in 1911 when this statute was in force and the law continued without change until by the Act of June 10, 1922, a new schedule of both base and longevity pay was provided for the officers of the Army, Navy, and Marine Corps. This statute provided for pay periods in the determination of the base pay, and made the question whether the officer should receive the pay of a certain period depend upon both the rank and the length of service of the officer.

Under this Act the base pay of the fifth period, amounting to $3,500 per year, was to be paid to majors of the Army of 23 years' service, and the base

pay of the fourth period, amounting to $3,000, was to be paid to majors of the Army of 14 years of service. But, if at that time there had been a question as to whether petitioner should have received 75 per cent of the base pay of the fourth or fifth period, that question was for the time being set at rest by the provisions of Section 1 of the Act to the effect that "nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922." In view of this provision of the law petitioner continued to receive as base pay 75 per cent (in accordance with Section 1274, Revised Statutes) of $3,000, the pay of a major (as provided in the Act of May 11, 1908), which was the situation in effect both at the time of retirement of the petitioner and immediately prior to the enactment of the Act of June 10, 1922.

This condition remained unchanged until by the Act of May 8, 1926, it was provided that thereafter the retired pay of officers retired on or before June 30, 1922 "shall not be less than that provided for the officers and warrant officers of these services of equal rank and length of service retired subsequent to that date; * * *."

Petitioner contends that after the enactment of this statute he is entitled to count both his active and retired service in the determination of his base pay period. This contention results from the fol-

lowing combination of statutes. By the Act of March 2, 1903, the petitioner, an officer retired on account of wounds received in battle, may count both active and retired service for the purposes of computation of his longevity pay. By the Act of May 8, 1926, it is provided that officers who were retired on or before June 30, 1922 (petitioner is such an officer) shall receive the same pay as officers of equal rank and length of service retired subsequent to that date. By the Act of June 10, 1922, it was provided that for officers in the service on June 30, 1922, there should be included in the computation for purposes of pay all service which was then counted in computing longevity pay. Petitioner therefore contends that he should be permitted to count service, both active and retired, which would make over 27 years of service and entitle him to 75 per cent of the pay of the fifth period.

The Government contended in the Court of Claims that the provisions of the Act of June 10, 1922, to the effect that all service may be counted which is now counted in computing longevity pay applies only to officers on the active list at that time and can have no effect upon the determination of the pay period of officers who were then on the retired list.

The Act of May 8, 1926, provides that thereafter the retired pay of officers who were retired on or before June 30, 1922, shall be not less than that

provided for officers of equal rank and length of service who were retired subsequent to that date. In other words, the officer retired before such date may receive the same or more pay, but he should not receive less than the officer retired after said date. We should, therefore, determine what is the highest pay of an officer who has equal rank and length of service with petitioner, and who was retired after June 30, 1922. In deciding this question we must consider whether the rank and length of service existing *at the date of retirement* is controlling. Should we consider only the length of service accrued at the date of petitioner's retirement, we have only thirteen years of active service, which would result in petitioner being entitled to receive the pay of the third period. The Government argued in the court below that only the active service could be counted. In support of this contention it was urged, as is pointed out by the Court of Claims in its opinion, speaking of the Act of June 10, 1922 (R. 10, 11), that—

> the provision to be found in Section 1 of the Act, 42 Stat. 627, that "For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay" does not refer to or include officers on the retired list. It has reference to officers on the active list. Clearly, when Congress says that nothing contained in the act shall authorize an increase in the pay of officers on the re-

> tired list, on June 30, 1922, it can not be supposed that in the next sentence, save one, the Congress was providing a method whereby there would be an increase in the pay of these same officers. To give the quoted language any meaning it must be referred to its context, where the act is dealing with pay of officers in the active service.

It seems clear that these provisions of the Act of June 10, 1922, were intended to deal only with the pay of officers on the active list, and Congress did not intend by that Act to increase the pay of retired officers. The Act expressly provides that there shall be no such increase. The Act of May 8, 1926, did intend to increase the pay of retired officers. Its purpose is clearly shown by the report of the House Committee on Military Affairs (House Report No. 857, 69th Congress, First Session). The report, referring to Sec. 1274 of the Revised Statutes, says:

> From this it will be noted that the pay of retired officers is not a fixed sum nor is it a specified sum, but it is 75 per cent of the pay of the rank upon which they are retired; that is, three-fourths of the pay of officers of similar rank still on the active list and not three-fourths of the pay at the date of retirement.

While this Act did intend to increase the pay of retired officers, there is nothing to show that it was intended to permit the counting of retired time in

the computation of the pay period. It is only fair to assume that the Act had in mind the normal case of officers retired from active service, and conceived as a comparative the usual case of an officer retired after active service with no retired service to his credit prior to the time of retirement. That this is probably what Congress had in mind is borne out by the fact, as pointed out above, that the Act of June 10, 1922, in providing for the counting of the same time in computing the base pay period as is counted in the computation of longevity pay, referred to officers on the active list; and by the further fact, that by the Act of March 2, 1903, Congress had changed the general rule created by the decision of this Court in the case of *United States* v. *Tyler*, 105 U. S. 244, and had limited those who could count retired time for longevity pay purposes to the very small class of those who had been retired for wounds received in battle.

In further support of the theory that the Act of May 8, 1926, contemplated only the case of ordinary retirement, it may be said that under the law as it stood at the date of said Act, an officer on the active list who had been previously retired presented a very unusual situation. The Act of June 4, 1920, (c. 227, 41 Stat. 759) contained a complete plan for the organization of the Army, definitely fixing commissioned strength in each grade. By Section 24 of said Act, including the subsections thereof (c.

227, 41 Stat. 759, 771; U. S. C. Title 10, Sec. 553), a method was provided for filling vacancies in the various commissioned grades in the Army. A promotion list was created, and in substance it was provided that vacancies in each grade should be filled only by promotion of officers on the promotion list. Prior to promulgation of the promotion list under the Act of June 4, 1920, it was possible for an officer who had been retired to be reappointed and recommissioned in the active service when a vacancy in the rank of his reappointment existed, and it was found that he was physically fit to perform military duty. But thereafter this could not be done in the absence of a special Act by Congress, since, under said Act of 1920, vacancies in the rank of major had to be filled from the captains at the top of the promotion list. Section 1255 of the Revised Statutes (U. S. C. Title 10, Sec. 1024) provided that—

> Officers retired from active service shall be withdrawn from command and from the line of promotion.

Sec. 51 of the Act of June 4, 1920 (c. 227, 41 Stat. 759, 785 (U. S. C. Title 10, Sec. 512)), provided that—

> In determining relative rank and increase of pay for length of service, and, in the case of officers of the regular army, in determining rights of retirement, active duty performed while under appointment from the United States Government * * * shall be credited to the same extent as service under a regular army commission.

By the Act of June 10, 1922, Sec. 17, it was provided that—

> Active duty performed after June 30, 1922, by an officer on the retired list or its equivalent shall not entitle such officer to promotion.

It thus seems apparent that at the time of the passage of the Act of June 10, 1922, as well as the Act of May 8, 1926, the normal case of a retired officer was one who had been retired at the end of a term of active service, with no prior retired service to his credit, and that, as a practical matter, under the then existing laws, no retired officer could be reappointed and recommissioned in his prior rank in the absence of a special Act by Congress. It is, therefore, believed that it is fair to say that Congress did not intend, by the Act of May 8, 1926, to permit retired officers to count their retired time for the purpose of computing their base-pay period.

The term "promotion" has usually been considered to mean a change in grade, such as a promotion from captain to major. This meaning was conceived prior to the time of the creation of different pay periods for the same rank, and when the base pay was dependent entirely upon rank, and before the base pay depended upon both rank and length of service. Now an officer of a given rank may be advanced to another base-pay period in the same rank, which entitles him to receive the same base pay as an officer of one of the lower-pay periods of a higher rank. This is a substitute for a promotion

in rank. In fact, it seems clear that the purpose of the creation of the pay periods, and the change of the plan of pay of officers of the Army, which was brought about by the Act of June 10, 1922, was to permit of a promotion of this kind where the old form of promotion was slow, irregular, and unjust.

Therefore it may be said that the advancement from one pay period to another is in effect, if not in fact, a promotion. Congress, by the legislation which we have discussed, has clearly shown an intent not to permit retired time to result in promotions, and has even prohibited officers on the retired list from receiving a promotion as a result of active duty performed on detail while on the retired list.

A further indication of the intent of Congress in such matters, showing that retired time should not be counted in the computation of the base pay of officers on the retired list, is found in the Act of May 26, 1928, where Congress provided that in computing the pay period of retired officers, "all active duty performed since retirement" shall be included.

Let us set up a comparative officer for the purpose of determining the base pay period of petitioner, an officer who has the same rank and length of service as petitioner and who was retired after June 30, 1922. He would have had on date of retirement after June 30, 1922, because of wounds received in battle, a service on the active list of 13 years and 1 month. After retirement he would have had active duty of 4 years and 9 months by detail while on the retired list, and then let us assume

he has been on the retired list 14 years since the date of retirement. This is the only true and exact parallel of petitioner. No other hypothesis would be a true or correct comparative, since it would have to assume a reappointment to active service, which is not the case with the service of petitioner. And, further than this, it would be impossible for any officer to have had 14 years' retired service between the date of petitioner's retirement in 1911 and a reappointment to the active list prior to the promulgation of the promotion list under the Act of June 4, 1920, after which there could be no reappointment to the grade of major.

The true comparative above described, having a service on the active list of less than 14 years, would, *on retirement*, have received the base pay of a major of the third period of $2,400 per year under the Act of June 10, 1922. When, after retirement, he had performed active duty on detail of 4 years and 9 months, he would have passed to the pay of the fourth period, since, under the Act of May 26, 1928, he could count this active duty to increase his pay. This would result in over 14 years' active service, but less than 23 years, giving him a base pay of $3,000 per year, which is the sum that petitioner received. He could not advance to the fifth pay period when his retired time added to active service exceeded 23 years, as this would be in effect a promotion, and, as above pointed out, is prohibited by Section 17 of the Act of June 10, 1922, and is not authorized by the Act of May 26, 1928. In fact,

the Act of May 26, 1928, by permitting the counting of active duty since retirement for the purpose of changing the pay period, clearly shows the intent of Congress that all other time on the retired list should be excluded in computation of the pay period.

Thus the true comparative, retired after June 30, 1922, of equal rank and length of service with petitioner, would be in the fourth pay period which was the rate of base pay received by petitioner. Therefore petitioner has received all to which he is entitled under the Act of May 8, 1926, which provides that the pay of officers retired on or before June 30, 1922, should not be less than that of officers of equal rank and length of service retired subsequent to said date.

CONCLUSION

While petitioner is of a class that deserves every consideration, yet it is believed he has received all to which he is entitled under existing laws, and that the decision of the Court of Claims is in accord with the law and the intent of Congress. It is, therefore, respectfully submitted that the judgment of the Court of Claims should be affirmed.

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JANUARY, 1929.